

Taking Aim at the Gender Pay Gap

July 10, 2019

The MeToo movement, which initially focused on sexual misconduct, has started conversations about gender equity in the workplace generally, sparking a renewed interest in addressing gender-based pay discrimination.

Overall, women receive about 80 cents on the dollar compared to men, while women of color typically receive even less—61 cents for Black women, 58 cents for Native American women, and 53 cents for Latina women—according to [estimates](#) by the National Partnership for Women and Families. The Institute for Women’s Policy Research [reported](#) that in 2018, the gender wage gap among full-time workers was about 18.9 percent, meaning the ratio of women’s to men’s median weekly full-time earnings was 81.1 percent. The gender-based pay disparity also [increases with age](#). The pay gap widens as much as 12 percent based on age: the gap is 10% for women ages 20-24 and 22% for women ages 55-64.

Although the gender wage gap is not a new problem, it has garnered renewed attention not only among advocates, but also among employers. Last year, the outplacement firm Challenger, Gray & Christmas, Inc., [surveyed 150 companies](#) on their compensation policies. In January 2018, a few months after the allegations against Harvey Weinstein broke, 48 percent of companies surveyed said that they were reviewing compensation structures to ensure pay parity between men and women. This number grew to nearly 58 percent in another survey the following June. In May 2019, Littler Mendelson PC [released a survey](#) of approximately 1,330 in-house lawyers and human resources professionals, which analyzed how employers addressed workplace gender equity issues. When asked to rank seven different workplace issues by “level of concern” created in the workplace (including, e.g., sexual harassment, gender pay equity, and immigration policy), 63% of respondents ranked gender pay equity in their top three issues of concern: 19% ranked it first, 23% ranked it second, and 22% ranked it third. Just under half of respondents said they had audited compensation policies and salary data to assess whether problems existed with respect to gender-based pay disparity.

At the federal and state level, laws aimed at addressing the gender wage gap have primarily focused on ensuring equal pay as a matter of law, establishing salary transparency for workers, and preventing employers from using salary history to perpetuate suppressed wages. At the agency level, the Equal Employment Opportunity Commission (EEOC) will be collecting wage data from covered employers that may provide the agency with more insights on pay disparities by sex.

Equal Pay Laws

In addition to violating Title VII of the Civil Rights Act’s provision against [sex discrimination](#), gender-based pay disparity can run afoul of the [Equal Pay Act of 1963](#) (EPA). The EPA prohibits covered employers from discriminating on the basis of sex by paying lower wages “to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d)(1). Unlike Title VII, there is no administrative exhaustion requirement and there is a longer, two-year statute of limitations period. The [Lilly Ledbetter Fair Pay Act of 2009](#) provides that each discriminatory paycheck is a separate violation regardless of when the discrimination began, and applies to

compensation claims brought under either the EPA or Title VII. See 42 U.S.C. § 2000e-5(e)(3)(A).

Nearly all states and the District of Columbia have some form of equal pay law on the books. Most state laws track language of the EPA, though coverage varies among jurisdictions. On June 12, 2019, Alabama became the 49th state to enact a state equal pay bill. Mississippi remains the only state without one. The Alabama law, which will take effect on September 1, prohibits employers from paying employees differently for the same work on the basis of sex or race. It also contains salary transparency provisions, discussed below.

Salary Transparency

One obstacle women can face to obtaining equal pay is company policies prohibiting employees from discussing salary and retaliation for doing so, even in the absence of an outright policy.

The National Labor Relations Act (NLRA) protects covered employees from employer interference with and retaliation for engaging in protected “concerted activities” for collective bargaining or other mutual aid or protection. See 29 U.S.C. §§ 157, 158(a). The National Labor Relations Board (NLRB) and many courts have found that because discussing wages can constitute such protected concerted activity, policies prohibiting workers from discussing wages may violate the NLRA. The NLRA, however, allows for policies that interfere with protected activity where there is a “legitimate and substantial business justification.” See, e.g., *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Moreover, employees with supervisory authority are not subject to this protection, damages can be limited, and – although an employee may file a charge with the NLRB – they cannot file in court.

Executive Order 11246, signed by President Lyndon B. Johnson in 1965, established various nondiscrimination provisions for federal contractors. In 2015, the Department of Labor’s Office of Federal Contract Compliance Programs promulgated regulations implementing that Executive Order, which require covered federal contractors and subcontractors to agree not to discharge or discriminate against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants. See 41 C.F.R. § 60-1.4(a)(3).

In an effort to address the gaps left by federal protections, at least 16 states and D.C. have salary transparency laws. Generally, such laws make it unlawful for employers to prohibit employees from discussing salary information with one another and prohibit retaliation against employees who do so.

Salary History Bans

At least 18 states have enacted some form of a salary history ban. Salary history laws prevent or place limits on an employer’s requesting salary information from job applicants or from their current or former employers. These laws are aimed at ending the cycle of suppressed pay for women and other minority groups that historically have been paid less. When employers ask applicants for salary histories, workers whose prior salaries were depressed as a result of discriminatory pay are further disadvantaged in the pay they will receive moving forward. Some state laws, such as California’s, go a step further and also prohibit employers from relying on an applicant’s salary information in making hiring decisions or determining what salary to offer an applicant. See Cal. Lab. Code § 432.3. The California law also requires employers to give applicants pay scale information upon reasonable request, which means after an initial interview with the employer.

EEO-1 Reports to Require Pay Data

The EEOC has historically collected information every year from covered employers (those with 100 or more employees) about how many employees they have broken down by race, ethnicity, and sex; these reports are known as [EEO-1 Reports](#). In 2016, under the Obama Administration, the Office of

Management and Budget (OMB) approved an EEOC proposal to include the collection of employee wage information and total hours worked broken down by race, ethnicity, and sex. The following year, however, the OMB under the Trump administration stayed the implementation of the new pay data rules—an action which the National Women’s Law Center and the Labor Council for Latin American Advancement challenged in court. In March 2019, the federal district court in D.C. vacated the OMB’s stay, ruling that its decision was arbitrary and capricious and lacked the required “reasoned explanation.” EEOC will therefore be collecting pay data from covered employers for 2017 and 2018, with a reporting deadline of September 30, 2019. Although the EEOC may not make EEO-1 data public (with exceptions for some federal contractors), it uses information from EEO-1 Reports in its enforcement efforts. Pay information broken down by sex may help the agency root out pay discrimination and identify patterns with respect to the gender wage gap.

As advocates, employers, and federal and state governments continue to work toward closing the pay gap and ending gender-based pay discrimination, anyone who suspects she is being paid less than a man for similar work should seek legal advice about her available remedies under the patchwork of federal and state laws.